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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 44

JOHN V. DOBSON,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

No. 47

H. J. HARWICK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

COME NOW The above named petitioners and present this their petition for a rehearing in these cases:

I.

The Court's opinion in these cases was filed on December 20, 1943. This petition is filed under Rule 33 within twenty-five days after judgment is entered. The Court is also requested to enlarge the time within which the mandates in

these cases shall be issued until such time as this petition for rehearing is disposed of.

II.

Grounds for Petition for Rehearing.

The Board of Tax Appeals in a memorandum opinion involving the tax liability of H. J. Harwick, petitioner in No. 47 herein, and in the case of John V. Dobson, 46 B. T. A. 770, petitioner in No. 44 herein, held that because in the opinion of the Board certain tax benefit had been realized by the taxpayers as a result of a loss sustained upon the sale of stock of the National City Company in 1930 and 1931, a portion (in the case of John V. Dobson) or all (in the case of H. J. Harwick) of the recoveries in 1939 constituted taxable income. This Court in its opinion specifically affirmed this conclusion of the Board of Tax Appeals.

However, in addition to the issue as to whether or not the recoveries in 1939 constituted income or a return of capital, the taxpayers also contended before the Board that any portion of the recoveries which constituted taxable income were taxable as capital gain under Section 117 of the Internal Revenue Code and not as ordinary income. This question is of importance to the taxpayers because if the income is taxable as ordinary income all of the income is taxable, whereas if the income is taxable as capital gain only, fifty per cent of the income is taxable and the maximum effective tax thereon is limited to thirty per cent. The Board of Tax Appeals found it necessary to pass on this issue in both the John V. Dobson case and the H. J. Harwick case because of its decision that part or all of the recoveries involved in those cases constituted taxable income. The Board rejected the contentions of the taxpayers and held that the portion of the recoveries taxable to John V. Dobson and Harwick constituted

ordinary income and not capital pain under Section 117. This conclusion is contained in the following brief statement found in the opinion of the Board in the case of *John V. Dobson,* 46 B. T. A. 770, 774:

> "Petitioner's contention that the income so realized should be taxed as capital gain is denied on authority of *Avery R. Schiller,* 43 B. T. A. 594."

This conclusion of the Board was the subject of an appeal by both John V. Dobson and Harwick to the Circuit Court of Appeals for the Eighth Circuit. That Court affirmed the decision of the Board in this respect. This issue was again raised in the petition for certiorari filed with this Court, the grant of certiorari was not restricted and the issue was discussed in the petitioners' brief filed herein, pages 34 to 36.

This Court in its opinion refers to this question as an "alternative argument. In making this statement this Court referred specifically to the case of James N. Collins and failed to note that in view of the decision of the Board in the John V. Dobson and Harwick cases this issue was not an "alternative" issue which became immaterial in view of this Court's refusal to reverse the application by the Board of tax benefit rule. At no place in the opinion of this Court is consideration given to the question as to whether the amount held to be taxable by the Board in the case of John V. Dobson or Harwick is to be taxable as ordinary income or capital gain under Section 117. The holding of the Court as expressed in the next to the last paragraph of its opinion herein indicates clearly that this issue was not considered:

> "We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit. The error of the court below consisted of treating as a rule of law that which we think is only a question of proper accounting."

The arguments of petitioners in support of their contention that the taxable income, if any, realized by John V. Dobson and Harwick constituted capital gain are set forth in the original brief filed with this Court, pages 34 to 36. It will be noted from the discussion therein that the taxpayers' contention that the portion of the recovery held taxable to John V. Dobson and H. J. Harwick constituted capital gain is based on the fact that the existence of any taxable income depended on the occurrence of a sale in 1930 or 1931. We, therefore, argued that the taxable income was "from" a sale within the meaning of Section 117. In rejecting this contention we believe that the Board not only clearly misconstrued Section 117, and therefore committed an error of law, but also fell into an inconsistency in its analysis of the facts. As pointed out in the Government's brief and noted in the opinion of this Court, the Government contended that "The principal question in this case turns on the application of the settled principle that the single year is the unit of taxation." The quoted statement relates to the discussion of the tax benefit problem. The Board held in passing on the tax benefit question that it would look at the entire series of transactions, *i. e.*, that occurred in 1929, 1930, 1931, and 1939, in determining whether or not taxable income resulted from the recoveries in 1939. It is submitted that a similar analysis of the identical facts requires the conclusion that in determining whether or not the recovery in 1939 resulted from a sale or exchange, the series of transactions must also be regarded as a single integrated transaction.

As noted above, the decision of the Board that the taxable portion of the recoveries in 1939 here involved did not constitute capital gain was based solely on the authority of *Avery R. Schiller*, 43 B. T. A. 594. That case involved a recovery of the purchase price of stock which had become

worthless in a prior year but had never been sold. The sole fact upon which petitioners herein base their characterization of the 1939 recoveries as capital gain, *i. e.*, the sales in 1930 and 1931, did not exist in the Schiller case.

In view of the decision of this Court as to the finality of decisions of the Tax Court, it is necessary to consider briefly the question as to whether the characterization of the income here involved as ordinary income or capital gain is a question of law which may be reviewed by this Court, or is a question of fact which may not be reviewed by this Court. Whether or not this income was capital gain depends on whether it was realized "from the sale or exchange" of a capital asset within the meaning of the quoted phrase as contained in Section 117 (a) (4) of the Internal Revenue Code. This same issue, although involving different facts, was submitted to this Court in a series of cases decided in 1941:

Helvering vs. Hammel (1941), 311 U. S. 504, 61 Sup. Ct. 368;

Electro-Chemical Engraving Co., Inc., vs. Commissioner (1941), 311 U. S. 513, 61 Sup. Ct. 372;

Helvering vs. Nebraska Bridge Supply & Lumber Company (1941), 312 U. S. 666, 61 Sup. Ct. 827.

All of these cases involved the question as to whether the loss sustained on certain specified transactions, *i. e.*, the loss sustained by a debtor on a mortgage foreclosure sale and the loss sustained by an owner of land upon foreclosure of a tax lien, resulted from a "sale or exchange" so as to be properly characterized as a capital loss. The statutory provisions involved were identical to the portion of Section 117 of the Internal Revenue Code here involved. This Court in all three of the decided cases reversed the decision of the Board of Tax Appeals and held that the transactions involved constituted "sales or exchanges" and therefore resulted in capital losses. This Court indicated in the *Hammel* case, 311

U. S. 504, 510, that it regarded the problem involved as one of statutory construction and interpretation, *i. e.*, a question of law. We, therefore, submit that whether or not the income which the Board held to be taxable to John V. Dobson and H. J. Harwick is taxable as ordinary income or capital gain is a question of law which is properly before this Court for review, and that the principles enunciated by this Court in its opinion of December 20, 1943, herein do not restrict the scope of this review.

Respectfully submitted,

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I, Leland W. Scott, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LELAND W. SCOTT.